

Equal Employment Opportunity Requirements

Introduction

The Missouri Department of Transportation (MoDOT) is committed to Equal Employment Opportunity (EEO) and believes all citizens should be given the opportunity to share in the responsibilities and economic benefits of the construction program. MoDOT is also dedicated to increasing the number of qualified Disadvantaged Business Enterprise (DBE) companies participating in the Federal-Aid Highway Program in an effort to contribute to the growth and self-sufficiency of those firms and small businesses in general. MoDOT, and all Federal-Aid Recipients, have the obligation to ensure all contractors, and their subcontractors, comply with the EEO and Affirmative Action (AA) requirements, as well as the DBE Program regulations. As Recipients, Local Public Agencies (LPA) are also required to comply with all Federal and State EEO and DBE program requirements. MoDOT and the Federal Highway Administration (FHWA) have established rules, regulations, and policies required to ensure Equal Opportunity and guide in the administration of the DBE Program.

This section has been prepared to assist all Recipients in the administration of contracts, including, contract inspection and enforcement. External Civil Rights personnel have been designated by MoDOT and have primary responsibility for the administration of the program, dissemination of information, acting as liaisons to other agencies, and to assist in the interpretation of regulations.

The present EEO requirements have evolved from several Executive Orders. The most recent is Executive Order 11246, as amended, which supersedes all previous orders and is currently in effect. The Federal-Aid Highway Act of 1968 required each state to sign a statement containing nine (9) assurances regarding EEO. This document officially committed MoDOT to Affirmative Action in all phases of operation. That commitment extends to all Recipients, or Sub Recipients, of federal funds from MoDOT or in affiliation with any program MoDOT administers under federal regulations.

General EEO Requirements

The federal regulations and laws require that all employees are treated in an equal and non-discriminatory manner. Recipients are responsible for ensuring that all employees are in fact treated in an equal manner and not subject to discrimination, disparate treatment, harassment, or any other illegal behavior. Discrimination is defined as "disparate treatment or impact on the basis of race, color, national origin, sex, religion, age, ancestry, veteran status or disability".

DISPARATE TREATMENT

Disparate treatment exists when individuals are treated differently in program participation or benefits. The treatment must appear to be related to the individual's race, color, national origin, sex, religion, age, ancestry, veteran status or disability and the entity fails to offer a legitimate and non-discriminatory reason for the difference in treatment.

DISPARATE IMPACT

Disparate impact exists when a policy, practice, condition, or decision is neutral on its face, however, it affects protected groups differently and the entity is unable to offer an explanation for the difference in impact.

DISCRIMINATION

Discrimination can be evidenced in three manners:

- (a) Difference in treatment for which the entity cannot offer a legitimate non-discriminatory explanation.
- (b) A failure to correct a discriminatory condition known to management.
- (c) A failure to respond to an allegation of discrimination or information that an individual is experiencing discrimination.

In order for all parties to comply with the regulations, notice of those requirements must be given. All contractors, consultants, or any other sub-recipient of federal funds, must be notified of the requirements to comply with the contractual EEO and AA regulations, policies, and procedures. This is accomplished by attaching and incorporating the specific requirements in contracts, notifications to Recipients and employees, and reports to the Recipient and MoDOT.

All federal-aid highway construction contracts must include specific EEO requirements, as set out in Chapter 23 of the Code of Federal Regulations Part 230 (23 CFR 230). In addition, all subcontracts and purchase orders exceeding \$10,000, not including contracts for supplying materials, must include the same requirements. This is accomplished by the inclusion or attachment of the Federal Aid Special Provisions PR-1273 and the "Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity" (Executive Order 11246).

The following EEO Special Provision items must be emphasized:

- (a) The contractor shall notify the Recipient, in writing, of the name, address and telephone number of the contractor's EEO and DBE Liaison Officers.
- (b) The contractor must require each subcontractor with a subcontract exceeding \$10,000 to notify the Recipient, in writing, of the name, address and telephone number of the subcontractor's EEO Officer. This is to be done at the time the subcontract is submitted for approval.
- (c) The Recipient shall physically attach a copy of the following documents to the contract. The Prime Contractor shall also attach a copy of each to any subcontractor's agreements which exceed \$10,000:
 - (1) Form FHWA 1273 (Required Contract Provisions Federal-Aid Construction Contracts) This form can be located on MoDOT's webpage.
 - (2) "Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity" and "Standard Federal Equal

Employment Opportunity Construction Contract Specifications.
This form can be located on MoDOT's webpage.

Job Site Requirements

Recipients must regularly inspect the project site bulletin board to ensure compliance with the requirements contained in the special provisions. Form FHWA 1273, requires placement of notices and posters setting forth the contractor's EEO policy. These should be placed at the project trailer, or the area on the project where employees regularly congregate. The board and the items posted must be on the front of the board, in good condition, and preferably weatherproofed. The required notices include:

- (1) Contractor's signed EEO Policy,
- (2) Notice of contractor's and subcontractor's EEO Officer, including the name, address and telephone number,
- (3) Federal and State Wage Rate Notices,
- (4) Notice to Labor Unions of Contractor's commitment to EEO,
- (5) Notice requesting Minority and Female referrals from present employees,
- (6) Notice to employees and applicants of available training programs and entrance requirements,
- (7) "Discrimination in Employment is Prohibited by Law in Missouri" (Appendix ?),
- (8) "Equal Employment Opportunity is the Law",
- (9) "Igualdad de Oportunidad en el Empleo es La Ley" (Spanish version of item 2),
- (10) "Wage Rate Information" FHWA-1495,
- (11) "Informacion Sobre Escalas De Salarios Proyecto De La Carretera De Ayuda Federal" FHWA-1495A (Spanish version of item 4)
- (12) FHWA 1022-Title 18

All posters can be found on MoDOT's website.

Complaints

Any complaint of unequal treatment, discrimination, or harassment must be investigated. The initial complaint may be written or oral. Recipient personnel must document the nature of the complaint, investigation documentation, and resolution. The final report must be forwarded to the MoDOT District Construction Office. In addition, if Recipient personnel are aware of any complaint filed with another federal, state, or local authority, the MoDOT District Construction Office must be notified. District Personnel will then forward the documentation to the External Civil Rights Section.

The notice must include:

- (a) name, address, and telephone number of the complainant,
- (b) name, address, and telephone number of the alleged discriminating individual (s),
- (c) the basis for the complaint (i.e. race, color, religion, sex, national origin, disability, ancestry, veteran status or age),

- (d) date of alleged discriminatory act (s),
- (e) date complaint was received by the Recipient,
- (f) a statement of the complaint, including the event or circumstance that caused the individual to feel they were discriminated against,
- (g) other agencies with which the complaint has been filed,
- (h) an explanation of the actions the Recipient has taken, or proposes to take, to resolve the issues raised.

Any witnesses, and the person (s) implicated, should be interviewed. Interviews must take place in a private area, free from distractions and interruptions. In order for all parties to feel secure in discussing the issue without repercussion, the location should also be as free from general visibility as possible. During the interview, special care should be taken to avoid confrontation or making judgments. A record of the facts, as the individuals state them, should be accurately kept. The interviewer must ensure that the individual has the opportunity to relay any additional information they feel is relevant. If any statements or issues are unclear, the interviewer must ask the individual (s) for clarification. When closing the interview, the allegation, process, and approximate time frame for response or resolution should be restated. Once the Recipient has determined whether or not discrimination occurred, the complainant must be notified of the findings, action to be taken, and avenues of appeal if the complainant is dissatisfied with the determination, within 45 days of receipt of the complaint. Upon completion of the investigation, a Report of Findings must be completed and forwarded to the MoDOT District Construction Office. This report must include all of the information set out above and any other relevant information available.

Title VI Requirements

MoDOT and all Federal Aid Recipients are required to comply with Title VI of the Civil Rights Act of 1964 which states:

“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

Includes:

- (a) Denying program services, aids, or benefits
- (b) Providing a different service, aid, or benefit, or providing them in a manner different than they are provided to others; or
- (c) Segregate or separately treat individuals in any manner related to the receipt of any service, aid or benefit.

Any person who believes that he or she, individually or as a member of any specific class or in connection with any Missouri Department of Transportation (MoDOT) program, has been subjected to discrimination prohibited by Title VI of the Civil Rights Act of 1964 may file a complaint with the MoDOT's External Civil Rights Unit. A complaint may also be filed by a representative on behalf of a complainant.

Complaints must be filed no later than 180 days after the date of the alleged act of discrimination.

In addition, the following Executive Orders must be complied with:

- Executive Order 12898 requires federal aid recipients to administer and implement programs, policies, and activities that affect human health or environment so as to identify and avoid “disproportionately high and adverse” effects on minority and low-income.
- Executive Order 13166 requires federal aid recipients to take reasonable steps to ensure meaningful access to their services to limited English proficient persons.

Disadvantaged Business Enterprise Program

The intent of the Disadvantaged Business Enterprises (DBE) program is to maximize the opportunities for bona fide disadvantaged firms to participate in federally-assisted programs. The overall objective of MoDOT's DBE Program is to provide an opportunity for access to the benefits of the construction program for all taxpayers. This goal must be balanced with the need to ensure that only small business concerns ***independently owned and controlled***, in substance and form, by one or more ***socially and economically disadvantaged*** persons are certified. The integrity and credibility of the DBE Program depends upon the establishment of procedures to ensure this objective is achieved. Therefore, determining the eligibility of a prospective DBE is a critical component.

The certification procedure must reflect the criteria set forth in Title 49 Code of Federal Regulations Section 26 (49 CFR 26). Ultimately each state is responsible for establishing a process that complies with federal and state regulations. MoDOT has established standards, in accordance with the requirements of 49 CFR Part 26, to ensure uniformity and as a means to achieve the objective. The DBE program is administered in the Division of Construction and Materials, External Civil Rights Unit. The External Civil Rights Unit must determine whether the applicant meets the certification requirements of 49 CFR 26. While many agencies have a DBE/MBE/WBE program, recipients are **REQUIRED** to use only firms certified by MoDOT and/or the Missouri Regional Certification Committee (MRCC) included in the MoDOT and/or MRCC DBE Directory and/or Addendum unless otherwise noted.

The certification process consists of three important steps:

1. Collection of specific information and documentation from the prospective DBE,
2. Analysis of the information and application of the Code of Federal Regulations and MoDOT's criteria for eligibility,
3. Certification or Denial of the firm.

Minimum DBE Eligibility Requirements

The eligibility criteria set out below is used to determine whether a firm is in fact owned and controlled by a socially and economically disadvantaged individual.

BUSINESS STATUS

A firm must be a small business, operational and in business for a profit, ***owned and controlled*** by one or more socially and economically disadvantaged individuals. The owners of the firm must possess the necessary ***resources*** or ***expertise*** to conduct the firm's primary business function and control the day to day operations of the company. The owners must provide more than prima facie evidence that the company was not organized in an attempt to take advantage of project goals, exists only on paper, or operates as a front for another firm.

OWNED AND CONTROLLED

A company must be at least 51% owned by one or more socially and economically disadvantaged individuals, or, in the case of any publicly owned business, at least 51% of the stock is owned by one or more socially and economically disadvantaged individuals.

The management and daily business operations must be controlled by one or more of the socially and economically disadvantaged individual owners.

SOCIAL AND ECONOMIC DISADVANTAGE STATUS

In order for a firm to qualify as a disadvantaged business, it must be under the management and control of one or more ***socially and economically disadvantaged*** individuals. By definition, socially and economically disadvantaged individuals are those U.S. citizens, or lawfully admitted permanent residents, who fall into one of the following categories:

- (a) member (s) of one of the presumptive minority groups designated in 49 CFR 26.5 including, Women, African Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and Asian Indian Americans, and is so regarded by that particular minority community,
- (b) individual (s) who have established social and economic disadvantage based on identification with another group, although they are not a member of a presumptive minority group, as designated in 49 CFR 26.

Individuals with disabilities are **not** presumed to be disadvantaged. A disabled person, not a member of a presumptive group, applying for certification as a DBE must prove social and economic disadvantage on a case-by-case basis. The applicant must demonstrate that the disability has been chronic, long standing, substantial, and has negatively affected the person's entry or advancement in business.

While the above are "presumed" to be socially and economically disadvantaged, that presumption can be rebutted. MoDOT must then examine several factors to determine if the individual does in fact meet the criteria. In addition, the criteria can be used to determine if an individual that is not a member of a presumptive group also qualifies as a disadvantaged individual.

SOCIAL DISADVANTAGE

MoDOT must make a determination on the individual's "Social Disadvantage" status by comparing the applicant with other members of the non-presumptive class. Factors to be considered include color, national origin, gender, physical disability, long-term residence in an isolated environment and specific instances of discrimination in education, employment, credit, contracting, or membership in business organizations.

The specific disadvantage must have been personally suffered by the applicant and must be ***chronic, long standing, and substantial***. If the applicant does not meet the social disadvantage test, it is not necessary to make an economic disadvantage determination.

ECONOMIC DISADVANTAGE

"Economic Disadvantage" refers to the inability to compete in the free enterprise system due to diminished capital and credit opportunities when compared to others in the same, or similar line of business, not socially disadvantaged. Consideration should be given to the individual claiming disadvantage and the applicant firm. MoDOT must determine if the applicant firm is in a more difficult economic situation than most firms, not socially disadvantaged.

- (a)
 - (1) You must require each individual owner of a firm applying to participate as a DBE (except a firm applying to participate as a DBE airport concessionaire) whose ownership and control are relied upon for DBE certification to certify that he or she has a personal net worth that does not exceed \$750,000.
 - (2) You must require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation. This statement and documentation must not be unduly lengthy, burdensome, or intrusive.
 - (3) In determining an individual's net worth, you must observe the following requirements:
 - (A) Exclude an individual's ownership interest in the applicant firm;
 - (B) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm).
 - (C) Do not use a contingent liability to reduce an individual's net worth.
 - (D) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such

assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

(4) Notwithstanding any provision of Federal or state law, you must not release an individual's personal net worth statement nor any documentation supporting it to any third party without the written consent of the submitter. Provided, that you must transmit this information to DOT in any certification appeal proceeding under §26.89 in which the disadvantaged status of the individual is in question.

(b) Rebuttal of presumption of disadvantage.

- (1) If the statement of personal net worth that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds \$750,000, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.
- (2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of §26.87.
- (3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.
- (4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$750,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

- (c) Individual determinations of social and economic disadvantage. Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$750,000 shall not be deemed to be economically disadvantaged. Insert info on \$750,000 cap

DBE Goals

It is MoDOT's intent to establish and maintain meaningful and effective goals in the federal aid construction program. Recipients are also required to comply with efforts to meet the overall program goals. In order to achieve the state wide goal, all Recipients are required to make a good faith effort to set and achieve DBE participation. MoDOT is required to establish the following types of goals for participation on all federally assisted activities:

OVERALL STATE GOAL

MoDOT has established a statewide DBE goal for the federal fiscal year. This goal is a percentage of the total federal funds expended in that year. MoDOT establishes an overall goal on a yearly basis which is approved by the United States Department of Transportation (USDOT).

CONTRACT GOALS

MoDOT will establish a goal for each federal aid project. That goal can be set at any percentage, even 0%. The prime contractor must meet or exceed the specified goal, or demonstrate that despite a "good faith effort" the goal could not be met.

Concurrence Process

MoDOT's External Civil Rights Unit is primarily responsible for setting individual DBE goals. MoDOT will give consideration to the availability, capabilities, and resources of DBE firms in the area. In addition, the External Civil Rights Unit evaluates the work type, length, and activities of each project to determine a reasonable DBE Goal on a project by project basis.

AUTHORIZATION TO ADVERTISE

Request for authorization to advertise must be submitted to MoDOT for concurrence. A proposed DBE Goal can be submitted at that time, however, the External Civil Rights Unit will set the appropriate DBE goal considering the factors listed above while taking into consideration the recipients requested goal.

CONCURRENCE IN AWARD

Once bids have been received and reviewed by the Recipient, MoDOT must concur prior to the award of the project. The request for concurrence must include a completed DBE Participation form. (DBE Contract Provisions Part B) or documentation of a good faith effort. The completed form must include an itemized statement of each bid item to be performed by each DBE. The itemization must include the quantities and dollar amount for each bid item to be performed. Partial performance of specific items is permitted, however, the dollar amount for those items must be adjusted to reflect the amount of the item to be performed by the DBE firm.

DBE Goal Verification

Recipients, through the contractors are required to meet the project participation goal with DBE firms performing a "commercially useful function". Recipients and contractors unable to meet the project goal must demonstrate a good faith effort to do so. The failure to fulfill the DBE contract requirement, or to demonstrate a good faith effort, constitutes

a breach of contract. MoDOT will determine the liquidated damages assessed against the Recipient.

GOAL VERIFICATION CALCULATION

The DBE goal is calculated from the original contract amount. The verification of compliance with that goal is calculated in the following manner:

Example

1.	Contract Goal x DBE Goal	$\$100,000 \times 10\% =$	10,000.00
2.	Subtract underruns of DBE items	-	2,000.00
3.	Equals Adjusted DBE Goal		8,000.00
4.	Item Totals (see table)		5,000.00

DBE Subcontractor (s)

Item	Final Quantity	Unit Cost	Total
1.1	120	\$25	\$3,000
2.1	10	\$100	\$1,000
3.1	50	\$20	\$1,000
Total			\$5,000

5.	Amount Paid to DBE (verified by Recipient)	6,000.00
6.	Lesser of Amount paid and Item Calculations	5,000.00
7.	Adjusted DBE Goal (No. 3 above)	8,000.00
8.	Allowed DBE amount (No. 6 above)	5,000.00
9.	Difference equals Liquidated Damages	\$3,000.00

The figures used to calculate DBE amount completed are those set out in the final estimate. Any overruns of items are given credit toward meeting the goal automatically. Each item previously approved to be performed by a DBE firm in the concurrence in award is compared to the final estimate quantities. The quantities on the final estimate is multiplied by the unit price. These amounts are then compared with the amounts paid to the DBE firms, as verified by the Recipient. The allowed amount will be the lesser of the actual amount paid or the subcontract value. The allowed amounts for all DBEs on the project are totaled and compared to the total dollar value of the adjusted contract goal. The difference between the goal and the allowed amount is the liquidated damages to be assessed.

MoDOT reviews the amount of DBE participation proposed by the prime contractor before the contract is awarded. The company, items to be performed, quantities and dollar amounts for each item, and quantities and dollar amounts set out in the contract are required for concurrence in award. Contractors are encouraged to exceed the contract goal in order to meet the objectives of the DBE program.

Goal Monitoring

The Recipient must enforce DBE contract provisions in the same manner as any other contractual requirement. Procedures have been established to ensure adherence to the contractual DBE goals. A determination to allow credit for DBE participation must consider the following situations.

Does the arrangement between the contractor and a DBE represent standard industry practice?

Does the DBE firm perform a commercially useful function?

Does the arrangement between the contractor and a DBE erode the DBE ownership, control, and independence?

Was the arrangement between the contractor and DBE contrived to artificially inflate the DBE participation?

The value of a DBE subcontract, with adjustments, may be included in the amount counted toward meeting the DBE goal, provided the company:

- (a) is certified by the Department as a legitimate DBE firm,
- (b) performs a commercially useful function in a distinct element of the contract and actually performs, manages and supervises the work involved,
- (c) does not enter into a subcontract agreement inconsistent with normal industry practice,
- (d) is paid for acceptable performance.

Credit will not be allowed if any of the following situations exist:

- (a) the cost of the DBE materials are arranged and paid by the prime contractor directly,
- (b) payment for the DBE materials is deducted from the prime contractor's payment (s) to the DBE,
- (c) the cost of leased or rental equipment used by the DBE is deducted from the prime contractor's payment (s) to the DBE,
- (d) the personnel or equipment of the prime contractor, or any other contractor, is involved in the performance of the DBE work,
- (e) the prime contractor, or any other contractor, performs the work of the DBE,
- (f) any portion of the work performed by the DBE does not constitute a commercially useful function. The prime contractor will receive credit for participation up to the point where the DBE ceased to perform a commercially useful function,
- (g) any subcontract arrangement is contrived to artificially inflate DBE participation.

The total dollar amount of contracts or subcontracts awarded to DBEs will count toward the contractual goals, while only the applicable federal participation amount on the project will count toward the Department's overall annual goal. In a joint venture with a DBE firm, only the total dollar amount of the DBE percentage of ownership and control in the project will be included in the DBE participation.

The work or service provided by the DBE must be a contract item, not a part of the contractor's general business overhead, such as supplying oil, fuel and other services required for day-to-day operations. However, these services could be included if an agreement is approved by the Department and they are eligible for reimbursement with Federal-aid funds.

When DBEs are brokers, distributors or vendors for the procurement of facilities, materials or supplies required, the allowed amount is limited to the DBE actual fee for the services. No credit is allowed for the cost of material or supplies.

The Department will approve 100% of expenditures made to DBE firms in the following situations:

- (a) manufacturers, defined as a business operating or maintaining facilities on the project that produces the materials or supplies required for the project. Brokers and packagers are not considered manufacturers,
- (b) fees or commissions for bona fide services. These include, but are not limited to, professional, technical, consultant or managerial services for assistance in the procurement of personnel, facilities, equipment, materials or supplies required. However, the fee or commission must be customary for the services required,
- (c) fees for delivery of materials and supplies, not the actual cost of those items, when the hauler, trucker or delivery service is not the manufacturer or a regular dealer for those materials and supplies. However, the fee must be customary for the services,
- (d) fees or commissions for providing bonds or insurance required for performance of the contract. The fees must be customary for the services provided.

Sixty percent (60%) of the value of goods purchased from regular DBE dealers or suppliers may be included in the contractor's DBE participation. A regular dealer or supplier is a business that owns, operates, or maintains a store, warehouse or other facility where the materials or supplies required are bought, stocked, and regularly sold to the public. Dealers of bulk items, such as steel, cement, gravel and petroleum products, **are not** required to maintain stock, but must own or operate the distribution equipment. If the distribution equipment is leased, it must be on a long term basis. A supplier functioning on an "ad hoc" basis, or for only one or two contractors or projects, is not a regular dealer.

GOOD FAITH EFFORTS

The Recipient must monitor the contractor's progress in achieving the contractual DBE participation for each project. At any time during the project, if the Recipient determines that achievement of the DBE goal is in jeopardy, the MoDOT Construction and Materials External Civil Rights Office should be contacted immediately. The External Civil Rights Unit will investigate the circumstances and determine if the contractor has made a "**good faith effort**" to meet the goal. The contractor is required to submit documentation of good faith efforts made and the circumstances that prevent them from meeting the goal. The External Civil Rights Unit will evaluate the efforts and determine if they are acceptable and constitute compliance with the DBE contract requirements.

"**Good faith efforts**" require more than mass mailed form letters and/or advertisement. The efforts should be intense, aggressive, and sincere actions on the specific project and

must go beyond simple paper exercises. Efforts should include personal contact, follow-up, and negotiations with DBE firms. The contractor must document steps taken to obtain DBE participation. Good faith efforts include, but are not limited to:

- (a) attending pre-bid meetings where DBE firms would be informed of contracting and subcontracting,
- (b) advertising for subcontracting opportunities in general circulation, trade association, and minority mediums,
- (c) written notices to all certified DBEs capable of performing the work required for the project. The notice must be given in sufficient time to allow the DBE to respond,
- (d) contacting the DBEs notified in (c), to determine their interest in submitting a bid,
- (e) determining portions of work to be performed by DBE firms. This may include breaking down contracts to facilitate DBE participation,
- (f) providing DBEs with plans, specifications and requirements of the contract,
- (g) negotiating in good faith with interested DBEs. Documentation of negotiation efforts must include the name, address, and telephone number of DBEs considered, a description of the information provided, the work selected for subcontracting, and a statement explaining why agreements with DBEs could not be executed,
- (h) documentation of sound reasons for rejecting a DBE firm's bid based on a thorough investigation of their capabilities,
- (i) efforts to assist interested DBE in obtaining bonding, a line of credit or insurance as required by the Department or prime contractor,
- (j) efforts to assist interested DBEs in obtaining equipment, supplies, materials, and any other necessary or related services,
- (k) contacting and using the services of minority community organizations, minority contractors associations, local, state and federal minority business assistance offices, and any other organization that provides assistance in the recruitment and placement of DBE firms.

MoDOT will review the contractors efforts and the quality, quantity, and intensity of those efforts. If the MoDOT determines that the contractor's efforts were merely superficial and could not reasonably be expected to produce sufficient DBE participation, the Department will not approve an adjusted goal. The prime contractor will then be assessed liquidated damages for failure to meet the contractual goal.

A lower quote from a non-certified subcontractor is not sufficient reason to excuse the contractor from utilizing a DBE. The contractor must submit an acceptable explanation for the assertion that the DBE quote was unreasonable, however, Prime contractors are not required to accept unreasonable quotes.

If the Department determines that the contractor has demonstrated good faith efforts, the DBE contract goal may be reduced.

REPLACEMENTS OR SUBSTITUTIONS OF DBES

The prime contractor is required to have a valid agreement with the DBE firms designated in the proposal. Substitutions are allowed only if it is demonstrated that the

DBE is "**unable or unwilling**" to perform. A prime contractor is not required to accept an unreasonable bid, however, the negotiation of a more advantageous contract with another subcontractor will not be considered a valid basis for substitution.

When a DBE is unable or unwilling to perform, the prime contractor must notify the Recipient in writing. The notification must include a statement from the non-performing DBE acknowledging the inability or unwillingness to perform. The prime contractor must also identify the replacement DBE. A replacement DBE firm is not required to perform the same work as the firm being replaced, however, failure to locate a replacement firm for the same items is not adequate efforts. If the prime indicates they are unable to locate a replacement DBE, documentation of good faith efforts to replace the company must be submitted. The prime contractor must also notify the Recipient when the non-performing DBE does not agree to the substitution, cannot be located, or fails to respond.

A prime contractor will not be allowed to perform work designated for a DBE, except in circumstances necessary to immediately protect the public safety or with prior approval from the Department. The prime contractor will be required to submit a revised plan, in advance if possible, detailing how the DBE goal will be met under those circumstances.

DBE TRUCKING OPERATIONS

In general, a trucker or hauler is given 100% credit for the delivery fee charged and a supplier is given 60% credit for products furnished. A firm certified as a trucker and supplier can be given 100% credit for hauling a product or 60% for supplying the same product, but will not receive credit for both.

A contractor may count toward the DBE contract goal 100 percent of the fees paid to a certified DBE trucker or hauler for delivery of material and supplies required on a job site, but not for the cost of those materials or supplies themselves, or for the removal or relocation of excess material from or at the job site, when the DBE certified trucking company is not also the manufacturer of or a regular dealer in those material and supplies, provided that the trucking or hauling fee is determined by MoDOT to be reasonable as compared with fees customarily charged by non-DBE firms for similar services. The certified DBE trucking firm shall also perform a CUF on the project and not operate merely as a pass through for the purposes of gaining credit toward the contract DBE goal. Prior to submitting a bid, the contractor shall determine, or contact the MoDOT External Civil Rights Administrator for assistance in determining, whether a DBE trucking firm will meet the criteria for performing a CUF on the project.

The following factors will be used to determine whether a DBE trucking company is performing a commercially useful function (CUF):

(a) To perform a CUF, the DBE trucking firm shall be completely responsible for the management and supervision of the entire trucking operation that the DBE is being paid for on the contract work. There shall not be contrived arrangement, including but not limited to, any arrangement that would not customarily exist under regular construction project subcontracting practices for the purpose of meeting the DBE contract goal.

(b) The DBE must own and operate at least one fully licensed, insured and operational truck used on the contract. This does not include a supervisor's pickup truck or a similar vehicle that is not suitable for hauling the necessary materials or supplies.

(c) The DBE receives 100 percent contract goal credit for the total reasonable amount the DBE is paid for the transportation services provided on the contract using trucks the DBE owns, insures and operates, using drivers that the DBE employs.

(d) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE firm that leases trucks from another DBE will receive credit for the total fair market value actually paid for of the transportation services the lessee DBE firm provides on the contract.

(e) The DBE may also lease trucks from a non-DBE firm, including an owner-operator. However, the DBE who leases trucks from a non-DBE is entitled to DBE contract goal credit only for the brokerage fee or commission the DBE receives as a result of the lease arrangement. The DBE will not receive credit for the total value of the transportation services provided by the non-DBE lessee. Furthermore, no DBE contract goal credit will be allowed, even for brokerage fees or commissions, where the DBE leases the trucks from the contractor on the project or a firm owned, controlled by, or affiliated by ownership or control to, the contractor.

(f) For purposes of this section, the lease shall indicate that the DBE firm leasing the truck has exclusive use of and control over the truck. This will not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, provided the lease gives the DBE absolute priority for and control over the use of the leased truck. Leased trucks shall display the name and identification number of the DBE firm that has leased the truck at all times during the life of that lease.

COMMERCIALLY USEFUL FUNCTION

Certification and Commercially Useful Function are separate and distinct issues. Certification decisions address the nature of a firm's ownership and structure. Commercially Useful Function requirements primarily concern the role a firm has played in a particular transaction. Failure to perform a commercially useful function will be considered during the certification process, however it may not necessarily be the sole factor. A DBE's repeated failure to perform a commercially useful function may raise questions regarding the firm's independence, ownership, and control. In these instances, MoDOT must verify the firm's eligibility. Any subsequent decision on continued certification must be based solely on the firm's ability to meet the eligibility standards.

A prime contractor will be given credit toward the applicable DBE contract goal for the amount paid to the DBE firm only if that firm performs a commercially useful function. Failure to fulfill this obligation will be considered a breach of contract and liquidated damages will be assessed. MoDOT will determine compliance with the commercially useful function requirement through application of the following principals:

- (a) the DBE is responsible for the performance, management and supervision of a distinct element of the work, in accordance with normal industry practice (except where such practices are inconsistent with the DBE regulations and these guidelines)

- (b) the firm receives the agreed upon compensation for the work performed, whether or not the agreement is standard industry practice.

If a DBE does not perform and exercise responsibility for at least 30 percent of the total cost of the DBE's contract with the DBE's own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, MoDOT will presume that the DBE is not performing a commercially useful function.

OTHER CERTIFICATION ISSUES RED FLAGS

The following situations are examples of firms that may not be operating as a legitimate DBE companies:

- (a) the work to be performed is outside of the DBE's known experience or capability,
- (b) the DBE provides little or no supervision of the work, the DBE superintendent is not a regular employee of that firm, or supervision is performed by personnel associated with the prime contractor, another business, or personnel not under the control of the DBE firm,
- (c) the DBE work force is not under the DBE firm's control and direction, or work is performed by personnel normally employed by the prime contractor or another business,
- (d) any portion of the work designated to be performed by a DBE subcontractor is performed by the prime contractor,
- (e) a substantial portion of the equipment used by the DBE firm belongs to the prime contractor, or another contractor, with no formal lease agreement or the equipment signs and markings cover another owner's identity, usually through the use of magnetic signs. MoDOT will determine "substantial portion" on a case by case basis,
- (f) materials or supplies necessary for the DBE firm's performance are delivered to, billed to, or paid by another business,
- (g) the DBE firm subcontracts or assigns any portion of work to another firm,
- (h) the DBE firm is working without a subcontract agreement approved by the Recipient, except in the case of trucking,
- (i) a DBE trucking business utilizes trucks owned by the prime contractor,
- (j) a DBE prime contractor subcontracts more than 50% of the contract value,
- (k) a DBE prime contractor only purchases materials while performing little or no work,
- (l) the agreement between the prime contractor and DBE firm artificially inflates the DBE participation or erodes the ownership, control or independence of the firm,
- (m) a DBE firm works for only one prime contractor,
- (n) employees work for both the DBE firm and the prime contractor or mentor,
- (o) the volume of work is beyond the capacity of the DBE firm,
- (p) inquiries by MoDOT or FHWA representatives are answered by the prime contractor or mentor,

- (q) the DBE firm's owner is not aware of the status of the work or the performance of the business.

MoDOT should be contacted immediately if any of these situations are encountered.

BORROWED OR LEASED EQUIPMENT

A DBE firm may lease specialized equipment (does not include trucks for hauling) from a contractor, including the prime, if it is consistent with normal industry practice and at rates competitive for the area. A rental agreement, separate from the subcontract, must specify the terms of the agreement. The lease must be for a short period of time and involve a specialized piece of equipment readily available at the job site. The lease may allow the operator to remain on the lessor's payroll, if this is a generally acceptable practice within the industry. The operation of the equipment must be subject to the full control of the DBE.

The DBE is expected to provide the operator for non-specialized equipment and is responsible for all payroll and labor compliance requirements. A separate lease agreement is required. Equipment leased and used in the DBE firm's work with payment deducted from the prime contractor's payment (s) to the DBE is not allowed. This situation should be reported to MoDOT for review.

DBE WORK FORCE

The DBE firm must have a superintendent supervising the project. That superintendent, or the owner, must supervise and exert complete control over that portion of the project. Little or no supervision by the DBE, supervision by personnel associated with the prime contractor, or supervision by personnel not under the control of the DBE, indicates that no commercially useful function is being performed.

The DBE work must be performed by personnel employed by the firm and under direct control and direction of the DBE company. Specialized equipment may be leased with an operator, however, the operator can not be an unemployed contractor, "between jobs", or reflected in the payrolls of a non-certified contractor.

If a DBE does not perform and exercise responsibility for at least 30 percent of the total cost of the DBE's contract with the DBE's own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, MoDOT will presume that the DBE is not performing a commercially useful function.

A request to use any of the prime contractor's work force or the regular employees of another business must be submitted to MoDOT for approval. The request must be received prior to the beginning of work by the DBE firm. At no time may more than 50% of the work force be the regular employees of the prime contractor. In addition, the superintendent can not be a regular employee of the prime contractor, or any other company.

The DBE firm must be responsible for all payroll and labor compliance requirements for all employees within the control of the company and is expected to prepare and finance the payrolls. Direct or indirect payments by any other contractor will not be allowed.

MATERIALS

The DBE must negotiate the cost, make payment and take delivery of any materials and supplies required for the project. The DBE firm must pay for these items and submit invoices in the name of the firm, not the prime contractor. The Recipient is responsible for periodic reviews of invoices to ensure compliance. The DBE firm must participate in scheduling the delivery of the materials and fully responsible for ensuring the materials meet specifications.

DBE credit is only given for actual payments. No credit is given for back charges or deductions.